88-1335

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GETTY PETROLEUM CORP.,

Petitioner,

—against—

BARTCO PETROLEUM CORP.,
NICHOLAS J. BARTOLOMEO,
ANTHONY GOLIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party's failure to object to a jury charge limits a circuit court of appeals' power to review a challenge to the charge, pursuant to Fed. R. Civ. P. 51, to only those cases where giving the charge constituted plain error by the district court.

2. Whether a punitive damage award for trademark infringement should be sustained on state law grounds pursuant to Fed. R. Civ. P. 49(a), where the court charged the jury and obtained findings of trademark infringement and contributory infringement.

3. Whether a federal court is authorized to charge punitive damages in an appropriate case brought pursuant to

the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051, et seq.

PARTIES

Getty Petroleum Corp., plaintiff (petitioner in this Court, also referred to as "Getty"), Bartco Petroleum Corp., defendant (respondent in this Court, also referred to as "Bartco"), Nicholas J. Bartolomeo, defendant (respondent in this Court, also referred to as "Bartolomeo"), Miracle Petroleum Corp., defendant ("Miracle"), Prugig Realty Corp., defendant, Anthony Golio, defendant, Peter Ciorciari, defendant, Lena Petroleum Corp., defendant, and A.E.N. Trucking Corp., defendant. There are no affiliated companies nor subsidiary companies of Getty, except wholly owned subsidiaries.

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ANTHONY GOLIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Getty Petroleum Corp., respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States

Court of Appeals for the Second Circuit, entered on September 22, 1988, as: (1) determined that the failure of the defendants to object to the jury instruction on the availability of punitive damages in a Lanham Act trademark infringement case, as required by Rule 51 of the Federal Rules of Civil Procedure, did not bar the respondents from assigning the giving of the instruction as error; (2) determined that the award of punitive damages in the sum of $2,005,000 could not be sustained in accordance with plaintiff's state law claim of unfair competition as the District Court did not present that claim to the jury; and (3) determined that punitive damages are not available under the Lanham Act and remanded the case to the District Court for it

to reconsider: (a) attorney's fees due the petitioner, eliminating from the amount awarded attorney's fees for the second trial, held solely on the issue of punitive damages; and (b) plaintiff's motion for enhancement of the compensatory damage award.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 103 (2d Cir. 1988) and a copy of it is annexed as Appendix A. The opinions of the District Court for the Eastern District of New York are not officially reported. A copy of the June 22, 1987 decision on plaintiff's motion for enhanced damages and defendants' motion for judgment notwithstanding the verdict ("judgment n.o.v.") is annexed as Appendix B; a copy of the August 25, 1987 decision on the motion

by the defendants for judgment n.o.v. after the second trial is annexed as Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on September 22, 1988 and issued it as a mandate on November 29, 1988. A copy of that judgment is annexed hereto as Appendix D. By order of the Second Circuit entered on November 14, 1988, the Court denied Getty's petition for rehearing. A copy of that order is annexed hereto as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within the time allowed by law.

STATUTES

The statutory provisions involved in this petition are the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq., 1114(1), 1116-1118, and 1125(a), which are set forth in Appendix F; Federal Rule of Civil Procedure 51, which is set forth in Appendix G; Federal Rule of Civil Procedure 49(a), which is set forth in Appendix H.

STATEMENT OF THE CASE[1]

Getty brought this action in the United States District Court for the Eastern District of New York to remedy injuries caused from the sale of non-Getty gasoline at three Getty brand gasoline stations located in Nassau County, New York (the "Oceanside," "New Hyde Park" and "Garden City Park" stations). Plaintiff's complaint charged: (Count I) violations under the Lanham Act for

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[1]References to the record shall be made as follows: (a) to the Joint Appendix as (A __); (b) to a trial exhibit, either plaintiff's, defendants' or court's (P Ex. #__), (D Ex. #__) or (C Ex. #___); and (c) to a trial transcript as (T, date, __). References to one of the Appendixes submitted to this Court along with this petition will be identified as "Appendix A," "Appendix B," etc., followed by a number representing the page.

trademark infringement; (Count II) violations of the Lanham Act from false designations of origin, false descriptions and false representations; (Count III) unfair competition; (Count IV) dilution of plaintiff's trademark value; (Count V) false advertising; and (Counts VI and VII) for monies owed under a loan agreement. (A 54-70)

Petitioner charged the station operators, Bartco at the Oceanside station from February 1, 1985 through May 3, 1985, Miracle at the Oceanside station from May 4, 1985 through January 29, 1986, and the operators[2] of the New Hyde Park station and the

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[2]These operators were defendants in the district court who did not appeal and are not respondents to this petition.

Garden City Park station, with direct infringement of the Getty trademark by selling non-Getty gasoline as Getty gasoline at "GETTY" brand franchises contractually obligated to sell only Getty gas. Bartco, Bartolomeo and Golio were charged with contributory infringement at the three stations by permitting and encouraging the sale of non-Getty gasoline at the stations and actually making deliveries of gasoline to these stations. The contributory infringers owned and controlled the stations and the actual infringers operated the stations through lease and sublease agreements. Getty argued in summation to the jury that the contributory infringers were the more culpable as they exercised economic control over the station operators, virtually necessitating the purchase

of non-branded gasoline. (T, 6/15/87, 10-80)

To petitioner's knowledge, this Court has never reviewed a case involving the species of trademark infringement prevalent in the gasoline industry, by which an unauthorized wholesaler of gasoline sells or causes to be sold a non-branded gasoline to the franchisees of the trademark owner, who then resell that gasoline as the branded gasoline sponsored or controlled by the trademark owner. This practice is often referred to in the industry as the "bootlegging" of gasoline. Commenting on such conduct, the Second Circuit once noted, in The Wisser Co., Inc. v. Mobil Oil Corp., 730 F.2d 54 (2d Cir. 1984), that the defendant was "committing a serious violation of Mobil's contract and

property rights and it was perpetrating a fraud on the public," 730 F.2d 54, 60.[3] Getty argued the culpable nature of the defendants' conduct to two juries, both of which returned

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[3]As compared with other forms of counterfeiting, for example, watches, pocketbooks or jeans sold for a fraction of the retail price, be they $20 Rolex watches or $15 Gucci bags, "bootlegging" of gasoline exploits the public to the greatest degree. While a reasonably informed purchaser of a $20 Rolex watch knows that what he buys cannot be the genuine article, the retail purchaser of gasoline cannot reasonably know the origin of the goods purchased, except by their mark. The commercial value of a trademark is well known and is evidenced by the billions of dollars spent each year in mergers and acquisitions. The most valuable asset purchased in those deals, more often than not, is the public's recognition of brand names and trademarks. The presence of "bootlegging" in the gasoline industry powerfully threatens this valuable asset by undermining public confidence that the item advertised is the item it will receive.

sizable punitive damage awards. The availability of punitive damages in a Lanham Act case is an issue never reviewed by this Court.

A. THE FIRST TRIAL

The first trial in this action occurred between June 2, 1987 and June 18, 1987. On June 18, 1987, the jury returned a verdict finding all defendants liable as charged, either for actual trademark infringement or contributory infringement and, in the case of Bartco, both actual infringement at the Oceanside station, as well as contributory infringement at all three stations. (A 114-122) In accordance with the 19th interrogatory in the Special Verdict, the jury further found all the defendants acted "willfully, intentionally and with a callous and reckless disregard for

Getty's trademark rights." So finding, the jury awarded punitive damages as follows:

Defendant	Amount
Bartco	$1,500,000
Bartolomeo	$3,000,000
Miracle	$ 75,000
Prugig	$2,500,000
Golio	$2,000,000
Lena and A.E.N.	$ 35,000
O'Reilly and Paddy O's	$ 40,000
Feigenbaum	$ 75,000

During the course of the trial, plaintiff's counsel withdrew certain of its claims in agreement with the District Court's suggestion that it would simplify the case and because they duplicated remedies available under the Lanham Act. On June 3, 1987, during plaintiff's case, petitioner withdrew its New York State claim of dilution of trademark value. (A 263; T, 6/3/87, 215) On June 9, 1987, petitioner withdrew the fourth

count, its state claim for false advertising. (A 268-272, T 6/9/87, 161-164) In asking that these claims be withdrawn, on June 9, 1987, the District Court stated, "I am trying to give the ultimate issues of fact to the jury. There are different theories of liability . . . that's for the court." (A 271; T, 6/9/87, 164) Getty never withdrew its state claim for unfair competition, Count III of the complaint.

On June 12, 1987, at the close of plaintiff's case, defendants made their perfunctory motions to dismiss. After denying the motions, the District Court considered requests to charge and asked petitioner's counsel whether, "the plaintiff has withdrawn all the legal theories except claim of trademark infringement." Getty's

counsel agreed. (A 272-273; T, 6/12/87, 18-19)

On June 17, 1987, the Court charged the jury. The Court defined trademark infringement as follows:

> Getty establishes the infringement of its mark when he proves by a preponderance of the evidence that the operator of the gasoline station knowingly sold non-Getty as Getty gas to the public.

(A 455) Contributory infringement was defined as follows:

> The liability or responsibility for trademark infringement goes beyond the actual infringer. One who knowingly and intentionally -- and I told you what knowingly means; that they were aware of what they were doing, intentionally means deliberately, not by mistake or negligence or any other event -- one who knowingly, intentionally, induces the infringement of a trademark and to continue the unlawful practice, or knowingly and intentionally participates in the practice is liable to

> damages to the owner of the mark.

(A 459-460) The Court, further, charged the jury that if it found a defendant infringed the Getty mark it should consider punitive damages:

> As to any defendant who you find acted willfully, intentionally and with a callous and reckless disregard to Getty's trademark rights, you are to fix punitive damages in such an amount as you find will deter others in engaging in trademark infringement. The amount you fix must be determined with calm discretion and sound reason and must never be fixed with bias, prejudice or sympathy.

(A 467) After charging the jury, the Court submitted the special verdict form consisting of 22 interrogatories, later supplemented by three additional interrogatories, asking the jury to make factual findings as to infringement and contributory infringement by each defendant for each station and

the damages caused by each. Interrogatory 19 asked whether the acts were done "willfully, intentionally and with a callous and reckless disregard for Getty's trademark rights." An affirmative answer to that question required the jury to designate the amount of punitive damages, if any, which should be awarded Getty. (A 114-122)

The defendants failed to object to the Court's charge on punitive damages. In fact, Bartco and Bartolomeo proposed their own charge on punitive damages. (C Ex. 6, 1st Trial) On June 18, 1987, the court rendered its verdict, assessing compensatory damages against each defendant and punitive damages in the amounts previously stated. (A 114-122)

B. RESPONDENTS' MOTION FOR JUDGMENT N.O.V. AND THE DISTRICT COURT'S JUNE 22, 1988 DECISION

After the jury rendered its decision respondents moved, orally, for judgment n.o.v. on the punitive damage award, on the grounds that the award went contrary to the weight of the evidence, or alternatively, to vacate the award as excessive and for a new trial pursuant to Fed. R. Civ. P. 59. (A 1323) Respondents never argued at the first trial in the District Court that punitive damages were unavailable under the Lanham Act.

On June 22, 1987, the District Court rendered its decision affirming the availability of punitive damages. (Appendix B) The Court cited Quaker State Oil Refining Corp. v. Kooltone, Inc., 649 F.2d 94 (2d Cir. 1981), a Second Circuit Lanham Act case which

upheld a $30,000 compensatory damage award and a $55,000 punitive award.[4] (Appendix B 5) The Court, however, ordered a remittitur of $350,000 against Bartco and Bartolomeo, jointly, and $150,000 against Golio, or a new trial, on the grounds that the amounts awarded were "so high as to shock the judicial conscience and constitute a denial of justice," citing Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978). (Appendix B 7) The Court upheld all other punitive recoveries.

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[4]This Court should know that plaintiff's trial counsel in this case defended on behalf of Kooltone, Inc., the Kooltone case.

C. **THE SECOND TRIAL**

Petitioner declined the remittitur and from July 13 through July 15, 1987, a second trial ensued limited to the issue of the amount of punitive damages, if any, to be assessed against respondents, Bartco, Bartolomeo and Golio. Respondents, Bartco and Bartolomeo, retained new counsel to defend this case. Neither Bartco, Bartolomeo nor Golio objected to the punitive damage charge during the second trial and Bartco and Bartolomeo, once again, proposed their own punitive damage charge. (A 136) On July 15, 1987, a second jury assessed punitive damages in the sum of $1,833,000 against Bartco and Bartolomeo and $172,000 against Golio. (A 154)

Following the verdict, Bartco, Bartolomeo and Golio moved for judgment n.o.v., or alternatively, a remittitur on the grounds that the second jury's awards of punitive damages were again excessive. (A 204-228) It was only after the second jury's verdict that the respondents, for the first time, challenged the availability of punitive damages under the Lanham Act.

The District Court, by decision dated August 25, 1987, denied respondents' motion in all substantive respects, except that the Court afforded respondents, Bartco and Bartolomeo, the opportunity to post security in lieu of a supersedeas bond. (Appendix C) The Court entered its judgment on July 16, 1987, (A 155)

and awarded $157,192 in attorney's fees on September 2, 1987. (A 365)

D. THE RULING OF THE COURT OF APPEALS

On appeal, respondents argued: (i) that punitive damages are not available under the Lanham Act; (ii) that the jury charge on punitive damages constituted plain error; and (iii) that Getty withdrew its state law claims. Getty cross-appealed[5] on the grounds that the District Court erred by vacating the first jury's punitive damage award as punitive damages need not be proportionate to

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[5]The Court of Appeals did not hear the cross-appeal, which was mooted by its decision. Should certiorari be granted, petitioner will ask this Court to remand the case to the Second Circuit for consideration of the cross-appeal.

compensatory damages and by not awarding enhanced damages.

The Court of Appeals ruled that punitive damages are not available in a Lanham Act case. (Appendix A) In reaching this result, the Court asserted jurisdiction to hear the issue, despite defendants failure to object to the punitive damage charge. Relying upon this Court's decision, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Court of Appeals asserted that even in the absence of plain error, a circuit court of appeals may hear an issue where: (1) the question of law is important; (2) the question was presented to and decided by the court of first resort; and (3) "no interests in fair and effective trial administration advanced by Rule 51 would be

served by a refusal to reach it." (Appendix A 9-10) The Court concluded that, "what questions may be considered and decided for the first time on appeal are left primarily to our appellate discretion based on the circumstances of each individual case." (Appendix A 11) The Court of Appeals, furthermore, found that Getty's state law claim of unfair competition did not provide an alternative ground for the recovery of punitive damages as, "the jury considered only plaintiff's federal trademark infringement cause of action." (Appendix A 7)

The Court of Appeals remanded this case to the District Court to reconsider whether enhanced damages should be awarded pursuant to § 35 of the Lanham Act, 15 U.S.C. § 1117.

(Appendix A 27) Upon remand, the District Court granted Getty's motion to enhance the compensatory damage award and by amended judgment dated December 22, 1988, enhanced damages by the sum of $111,924.50.

REASONS FOR GRANTING THE WRIT

The three questions presented in this petition warrant review by this Court due to the important issues of federal law involved as well as the split in the Circuits on the questions presented as nos. 1 and 2.

First: the Second Circuit's refusal to bind itself to the express dictates of Fed. R. Civ. P. 51 created for that Circuit a rule allowing it to review any legal issue it deems appropriate. This Court, in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), limited its decision

to circumstances in which it would review an issue by granting a writ of certiorari, and did not extend its decision to permit circuit courts to entertain challenges where an appellant failed to object to the jury charge at trial. By appropriating to itself the authority taken by this Court in Fact Concerts, the Second Circuit effectively nullified Rule 51. Furthermore, the Second Circuit and the Third Circuit stand alone in the belief that courts of appeals possess inherent authority to hear an issue where an appellant does not object to the jury charge. All other circuits will only entertain such an appeal in extraordinary cases involving plain error by the district court.

Second: the Court of Appeals' decision is inconsistent with Fed. R.

Civ. P. 49(a). Its failure to consider Getty's state law claim of unfair competition on the grounds that the District Court did not instruct the jury on that claim, overlooked the fact that where a special verdict form is used, a jury need only be instructed on the particular factual interrogatories before it. As a consequence of its decision, the Second Circuit stands alone in requiring that the law of the case go to the jury where a special verdict is submitted.

Third: in ruling that punitive damages are not available in a Lanham Act case, a question that the Court of Appeals itself determined to be of importance and one never decided by this Court, the Court overlooked the fact that nothing in the Lanham Act precludes a federal district court

from awarding punitive damages in an appropriate case. In an analogous situation, this Court authorized punitive damages in § 1983 cases under common law principles. Smith v. Wade, 461 U.S. 30 (1980).

POINT I

IN REACHING THE ISSUE OF PUNITIVE DAMAGES UNDER THE LANHAM ACT, THE CIRCUIT COURT ABROGATED THE EXPRESS DICTATES OF FED. R. CIV. P. 51 BY PERMITTING AN APPELLANT TO ASSIGN ERROR WITHOUT OBJECTING TO THE JURY CHARGE AND IN THE ABSENCE OF PLAIN ERROR

A. FED. R. CIV. P. 51 PROHIBITS AN APPELLATE COURT FROM REACHING THE MERITS OF A LEGAL ISSUE NOT PRESERVED BY AN OBJECTION TO THE JURY CHARGE

In reaching the merits of respondents' challenge to punitive damages in a Lanham Act case, the Second Circuit refused to be bound by Fed. R.

Civ. P. 51. Rule 51, in relevant part, provides:

> No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Not only did respondents fail to object to the jury charge on punitive damages in this case, but Bartco and Bartolomeo suggested a charge of their own at both the first and second trials. The respondents failed to object to the charge, yet in direct contravention of Rule 51, the Court of Appeals permitted the party to assign as error the very issue presented to the jury without objection.

The Second Circuit based its decision to reach the merits of the Lanham Act challenge on City of

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) and attempted to fit the factors enumerated in that case to the circumstances of this action (See "Statement of the Case" Point D, supra). The Court of Appeals, however, went further and declared, "what questions may be considered and decided for the first time on appeal are left primarily to our appellate discretion based on the circumstances of each individual case." (Appendix A 11).

The Court of Appeals wrongly confused its discretion with that of this Court. In Fact Concerts, the Court held that punitive damages against municipalities are not available in an action brought pursuant to 42 U.S.C. § 1983, reaching that issue despite the municipality's failure to

object to the jury charge on punitive damages. The Court, in Fact Concerts, concluded that its jurisdiction to grant or decline certiorari would not be limited to the "plain error" standard applied by courts of appeals.[6] Finding that: (1) the question presented was novel, important and likely to recur; (2) it was presented and decided on a complete trial record before the district court and court of appeals and was fully briefed before the Supreme Court; and (3) a refusal to hear the issue would neither be in the interests of

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[6]In St. Louis v. Praprotnik, 108 S. Ct. 915 (1988), this Court again heard an issue, arguably where no objection was made to the jury charge. In Praprotnik, however, the issue was raised twice in the district court, by motion for summary judgment and motion for a directed verdict.

justice, nor advance efficient judicial administration, the Court resolved the case on the merits. 453 U.S. 247, 257. The Court stated, "while concluding that in this unusual case, the interest of justice warrants our plenary consideration . . . we express no view regarding the application of the plain-error doctrine by the Courts of Appeals," (citations omitted). 453 U.S. 247, 258, f.n. 16.

That this Court has not authorized circuit courts to hear issues previously waived is clear from other decisions. In Oklahoma City v. Tuttle, 471 U.S. 808, rehearing denied, 473 U.S. 925 (1985), the Court denied a Rule 51 objection, where the respondent raised the issue for the first time in one sentence of her Supreme Court brief, again at oral

argument and in a post-argument brief. The Court stated, "our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." 471 U.S. 808, 816. On the other hand, the Court noted that its decision may well have differed had the objection been raised earlier:

> We do not mean to give short shrift to the provisions of Rule 51. Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals.

471 U.S. 808, 815.

Indeed, in Springfield v. Kibbe, 480 U.S. 257 (1987), the Court, in a case strikingly similar to the one before it now, dismissed a writ of certiorari as improvidently granted, when it came to the Court's attention that not only did the petitioner fail

to object to the jury charge on gross negligence, but itself offered a gross negligence charge. In this case not only did the respondents not object to the charge of punitive damages, but counsel for Bartco and Bartolomeo twice proposed charges of their own.

While the Second Circuit took pains to suggest that its decision constituted a narrow exception to Rule 51, a close examination of the decision reveals, rather, a convenient expediency. While it is conceded that any legal issue which disposes of a case, if reached by a court of last resort, will not thereafter complicate the case, to allow parties to claim error on that basis constitutes a distortion of Rule 51 and is in this case simply unfair. What the Second Circuit deemed an exception to Rule 51

would, in practice, permit circuit courts of appeals to hear any legal issue they wish to reach.

Getty's counsel's remark to the trial court on June 12, 1987, that the only legal theory remaining in the case was for trademark infringement, occurred when the District Court considered both the plaintiff's and the defendants' request to charge. (A 272-273: T. 6/12/87, 18-19) Getty's counsel relied upon the fact that none of the defendants objected to the instruction on punitive damages and that Bartco and Bartoleomeo proposed their own charge.

Although the District Court discussed the availability of punitive damages in deciding respondents' motion for judgment n.o.v. at the first trial, it did so sua sponte.

Getty never received notice that punitive damages would be contested by the respondents. To the contrary, the District Court's reference to Quaker State Oil Refining Co. v. Kooltone, Inc., 649 F.2d 94 (2d Cir. 1981), gave petitioner no reason to doubt its rights during the ensuing proceedings. Kooltone approved a punitive damage award in a federal trademark action. Getty's counsel defended the Kooltone case and thus possessed first-hand knowledge that the decision included a finding that defendant's counsel failed to object to the jury instruction. Getty and Getty's counsel had every reason to believe that just as the verdict in Kooltone could not be

challenged on appeal, neither could the verdict in the instant case.[7]

Getty's decision to decline the remittitur, as well as to press the District Court for a determination of its right for punitive damages under its state law claims, rested upon prior controlling precedent which affirmed both the availability of the award and the unavailability of a challenge, absent objection to the jury charge.

The Second Circuit's reference to Singleton v. Wulff, 428 U.S. 106

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[7]It is likely that the Second Circuit reached out to hear this issue, not due to an inherent necessity, but rather due to its desire to correct what it perceived to be a mistake in the Kooltone case. If so, the court erred twice by attempting to correct an error of substantive law with an error of procedural law.

(1976), is somewhat astonishing. (Appendix A 11) In Wulff, this Court overturned the Eighth Circuit's decision to reach the merits of a Missouri statute excluding Medicaid benefits for abortions. The court found no need to remand to the district court on the grounds that the validity of the statute presented a purely legal question. In reversing that conclusion, the Supreme Court noted that a litigant should be entitled to present evidence on a question and, "even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute." 428 U.S. 106, 120. In this case, the record shows that Getty never withdrew its unfair competition claim under New

York State law. A proper challenge to the punitive damage award, at the district court level would have allowed the District Court to rule on whether Getty properly preserved its state law claim.[8]

Given: (1) the reliance of both Getty and the District Court on Kooltone; (2) the failure of the defendants to challenge the availability of punitive damages before the

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[8]In Getty Petroleum Corp. v. Island Transportation Corp., 862 F.2d 16 (2d Cir. 1988), which the Second Circuit called the "Getty II" decision, the court distinguished an award of punitive damages under pendent New York State claims from recovery of punitive damages under the Lanham Act alone. It is hard to see any equitable basis for the court's determination of the punitive damage issue in Getty I, since it is undisputed that on the exact same facts, Getty could have recovered based upon a New York State claim.

District Court; (3) the right to recover punitive damages on the same set of facts under state law; and (4) the willful and egregious conduct of the defendants, the decision of the Second Circuit can only be viewed as harsh and inequitable. While the Second Circuit evidently wished to reach the punitive damage issue, even-handed treatment of Getty should have at least dictated that the Court, in issuing its decision, give Getty the right to a new trial on its state law claims. In analogous situations, where a rule of law mistakenly relied upon may cause undue hardship, appellate courts will consider making a ruling prospective in application. Simpson v. Union Oil Co., 396 U.S. 13, 14 (1969) (while holding that the rule should not be prospective in the same

case, the Court left open the possibility that the equities of a different case might persuade otherwise); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969). The most equitable course of conduct, however, would simply have been to wait for the issue to be properly presented, before deciding it.

Unlike this Court, which only hears appeals as of right under limited circumstances, and issues of law on writ of certiorari in the exercise of its discretion, courts of appeals must hear all issues, properly preserved for review, as a matter of right from a final judgment or order. The issue which the Second Circuit, therefore, deemed of such importance, would be before it again in the near future. If not, the reason must be

that left unresolved it presented no problems to litigants in the district courts, itself negating the necessity for appellate review.

By deciding to reach the merits of this case, the Court of Appeals for the Second Circuit improperly equated its discretion and powers of review with that of this Court. By so doing, it degraded the plain language and purpose of Fed. R. Civ. P. 51 and the rights of the petitioner. A writ of certiorari should issue to correct this significant departure from proper appellate procedure.

B. A SPLIT IN THE CIRCUITS EXISTS AS TO WHETHER THE COURTS OF APPEALS ARE BOUND BY RULE 51 IN THE ABSENCE OF PLAIN ERROR

The Federal Reporter System is replete with cases from each of the Circuits which hold that failure to object to proposed jury instructions in accordance with Rule 51 precludes appellate review. 5A J. Moore and J. Lucas, Moore's Federal Practice, par. 51.04, pp. 51-13 to 51-20, note 3 (1988); 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2553, p 639, nn. 51-52 (1971).[9]

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[9]Three examples in civil rights litigations, precluding review where defendant made no objection to the court's charge of exemplary damages are: Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965); Burns v. Travelers Insurance Company, 344 F.2d 70 (5th Cir. 1965); Great-West Life Assurance Company, v. Levy, 382 F.2d 357 (10th Cir. 1967).

Before this Court decided City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), general unanimity in the circuits existed that failure to object to a jury charge precludes appellate review except in extraordinary circumstances of plain error. As once stated by the Second Circuit in Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985), "we may review a jury charge for error absent timely objection by the harmed party only where the error is 'plain and may result in a miscarriage of justice' . . . or 'in obvious instances of . . . misapplied law,'" (citations omitted). 757 F.2d 489 at 494. Nevertheless, in the wake of City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), considerable confusion in the circuits now exists as to whether they are

required to decline appellate review pursuant to Fed. R. Civ. P. 51, in the absence of plain error, where the appellant failed to object to the jury charge at trial.

Of the circuit courts which considered the question, the Eleventh Circuit continues to consider itself bound by the plain error standard. Thus, in Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571 (11th Cir. 1983) and again, more recently, in Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521, 1533 (11th Cir. 1987), cert. granted, 108 S. Ct. 2042 (1988), the court declined to depart from the plain error exception to Rule 51, despite citing and discussing Fact Concerts. Similarly, the First Circuit, in Emery-Waterhouse Co. v. Rhode Island Hospital Trust

National Bank, 757 F.2d 399 (1st Cir. 1985), and again in Elwood v. Pina, 815 F.2d 173 (1st Cir. 1987), invoked the plain error rule. While in Pina the court distinguished Fact Concerts, the court made no finding that upset the plain error standard.

The Second Circuit, in this case, appears to be the first Circuit Court of Appeals to actually rely upon Fact Concerts, as authority to review an issue, where the appellant failed to object to the jury charge.

Other Circuit Courts, however, while not actually reaching the merits of issues not properly preserved for appeal, hazarded the opinion that Fact Concerts creates an exception to the plain error standard. The Seventh Circuit refused to review a jury charge which allowed the jury to award

punitive damages, if the jury believed "that justice and the public good require it," on the grounds that the doctrine of plain error does not protect parties from "the consequences of their decisions in civil litigation," in Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987). Nevertheless, the Seventh Circuit therein noted that Fact Concerts created a possible exception to the plain error rule. More recently, the Seventh Circuit in Williams v. Boles, 841 F.2d 181 (7th Cir. 1988), cited Fact Concerts, for the proposition that "[w]hen law in the process of transition overtakes the events of trial, a court sometimes may correct what in retrospect is an error, even if the objection at the time was inadequate." 841 F.2d 181, 184. The

Seventh Circuit, however, refused to hear the challenge to a "severe injury" instruction, where plaintiff's counsel himself proposed a form of such an instruction.

Similarly, although the Third Circuit distinguished Fact Concerts, in Black v. Stevens, 662 F.2d 181 (3rd Cir. 1981), cert. denied, 455 U.S. 1008, reh. denied, 456 U.S. 950 (1982), the court in Weaver v. Bowers, 657 F.2d 1356 (3rd Cir. 1981) cert. denied, 455 U.S. 942 (1982), relied upon Fact Concerts, to review the denial of defendant's claim of failure to state a cause of action, raised for the first time in a motion for judgment n.o.v. Although not directly implicating Rule 51, as Bowers did not involve a jury charge, the Court of

Appeals called its decision to reach untimely issues an "inherent power."

It is evident that the circuits are split as to whether in light of Fact Concerts, they are bound by Rule 51. This Court should grant certiorari to set forth clear guidelines as to when a claim of error may be heard on appeal.

POINT II

THE COURT OF APPEALS UNDERMINED THE PURPOSE OF FED. R. CIV. P. 49(a) IN HOLDING THAT PETITIONER WAIVED ITS STATE LAW CLAIMS DUE TO THE FAILURE TO INSTRUCT THE JURY ON THE LAW OF UNFAIR COMPETITION, AS THE SPECIAL VERDICT FORM SUBMITTED CONTAINED ONLY FACTUAL FINDINGS THAT WARRANTED EITHER THE DISTRICT COURT, OR THE COURT OF APPEALS, TO ENTER JUDGMENT ON PETITIONER'S STATE LAW CLAIM OF UNFAIR COMPETITION, AS A MATTER OF LAW

Fed. R. Civ. P. 49(a) governs the use by district courts of special verdicts. The rule, specifically, does not require the court to charge

the jury on the complete law of the case, but only that the court:

> Give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.

The use of a general verdict requires that the jury receive complete instructions on the law for each count in the complaint to insure that the verdict is not the result of a mistaken notion of the rights of the parties. With a special verdict, on the other hand, only those instructions relevant to the factual interrogatories comprising the verdict need be given.

The trial record plainly discloses that Getty never withdrew its claim for state law unfair competition, a species of which is common law

trademark infringement. The Second Circuit, however, dismissed as unimportant the existence of this claim in the pleadings, citing Bass v. Hoye, 766 F.2d 1190 (8th Cir. 1985), for the rule that "what are pertinent are the theories of recovery actually charged to the jury." (Appendix A 7) The Second Circuit made the serious error of applying the rule applicable to general verdicts, when no findings of fact are made. In this case, on the other hand, the jury's finding of trademark infringement supported recovery under both the Lanham Act and the state common law of unfair competition and merely required an application of law to the facts in rendering judgment.

The flexibility of Rule 49(a) allows entry of a judgment even where

the jury failed to make findings of fact determinative of a cause of action. In that situation the District Court is required to supply the missing finding of fact, without the jury.

Case law is consistent in holding that the trial judge need not instruct the jury on the legal application of the factual findings comprising the special verdict. In Cate v. Good Bros., Inc., 181 F.2d 146 (3rd Cir.), cert. denied 340 U.S. 826 (1950), the court did not instruct the jury on the legal principles involving mitigation of damages, but rather propounded factual interrogatories which permitted the trial court to decide that issue. The court noted, "the jury did not require information or guidance concerning the legal principles which

the judge would apply to their findings." 181 F.2d 146, 149. In Thedorf v. Lipsey, 237 F.2d 190 (7th Cir. 1956), the court upheld the district court's refusal to instruct the jury on the effect of a finding of comparative negligence, despite a jury request for such instruction. The court noted that under Rule 49(a) the trial court is responsible to apply legal principles to the facts and that, "the jury is not entitled to information concerning the legal principles which the judge will apply to their findings." 237 F.2d 190, 193. As the Second Circuit once noted in Ratigan v. New York Central Railroad Co., 291 F.2d 548 (2d Cir.), cert. denied, 368 U.S. 891 (1961), where a special verdict is taken pursuant to Rule 49(a), "the trial judge reserves

a large measure of control over the judgment to be entered, in the interest of substantial justice between the parties." 291 F.2d 548, 555.

The Second Circuit highlighted the fact that Getty's counsel agreed that no legal theories remained in the case, other than trademark infringement. Getty's counsel, however, never limited plaintiff's rights to the Lanham Act, agreeing only that "trademark infringement" constituted the theory of the case. (A 272-273, T. 6/12/87, 18-19). The right to recover for trademark infringement can be brought under both the Lanham Act and pursuant to the common law of unfair competition and both those grounds remained in the case.

It is in this context that the Circuit Court erred in the conclusion

that, "no unfair competition issues were presented on the special verdict form for the jury to decide." (Appendix A 8) Trademark infringement is but a form of unfair competition.

As this Court stated in Hanover Star Milling Co. v. D. D. Metcalf, 240 U.S. 403 (1916):

> "Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another . . .
>
> This essential element is the same in trademark cases as in cases of unfair competition unaccompanied with trademark infringement. In fact, the common law of trademarks is but a part of the broader law of unfair competition. (Citations omitted) (Emphasis added).

240 U.S. 403, 412-413. It is, therefore, an inescapable conclusion that a finding of trademark infringement necessitated a finding of unfair competition.[10]

Rule 49(a) certainly allowed both the District Court and the Court of Appeals to uphold the jury verdict on

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[10]The court's statement in D.D. Metcalf is entirely consistent with New York State law. In Dell Publishing Co. v. Stanley Publications, Inc., 9 N.Y.2d 126, 211 N.Y.S.2d 393 (1961), the New York Court of Appeals stated, "it is fundamental that the substantive law of trademarks is merely a portion of the broader law of unfair competition . . . and that it is intended to discourage and restrain one from palming-off his goods and/or their origin as the goods of another." 9 N.Y.2d 126, 133. New York's Pattern Jury Instructions, a work relied upon by New York's trial courts in charging juries, states that New York courts "have concurrent jurisdiction to enforce rights arising out of the Lanham Act," N.Y. PJI, Supp., § 3.58, p. 217.

unfair competition grounds, as a matter of law, consistent with the presumption, on appeal, which favors sustaining a judgment correctly rendered, even where the grounds cited were in error. See, Helvering v. Gowrin, 302 U.S. 238 (1937), reh. denied, 302 U.S. 781 (1938); Continental Can Co., Inc. v. Horton, 250 F.2d 637 (8th Cir. 1957).

The Second Circuit in this case failed to articulate any basis in which the respondents would have been prejudiced by an affirmation of petitioner's judgment on unfair competition grounds, even were petitioner to agree, arguendo, that petitioner raised its unfair competition claim for the first time on appeal. As stated in Universe

Tankships, Inc. v. United States, 528 F.2d 73 (3rd Cir. 1975):

> [A] different theory of recovery may not be urged on appeal where prejudice would result to the other party. The test for prejudice in this context is whether the other party "had a fair opportunity to defend and whether it could offer any additional evidence on the different theory," (Citations omitted).

528 F.2d 73, 76. Indeed, the defenses that the respondents could muster against the unfair competition claims differed, not a wit, from those raised under the Lanham Act. No prejudice on the record exists which militated against the Court of Appeals upholding the punitive damage award on state law grounds.

The respondents are simply unable to claim that they would have defended the case differently had the District Court asked the jury whether the

respondents unfairly competed with Getty. Such an interrogatory would have necessitated the further instruction that trademark infringement is merely a portion of the broader law of unfair competition and if the jury finds that the respondents infringed Getty's trademark, it must also find the respondents competed unfairly with the petitioner. The absence of that interrogatory and those instructions were not prejudicial. The prejudice to the petitioner and the public, on the other hand, by not sustaining the judgment on the basis of a different theory of recovery, is substantial. Respondents were thereby permitted to escape punishment meted out by two different juries. The two very substantial jury awards evidence the voice of the people as to

the seriousness of the respondents conduct, affecting not only the petitioner, but the public generally. That conduct was so significant that it warrants punishment in the form of substantial punitive damage awards.

The Second Circuit, by concluding that Getty's right to recover depended upon the instructions given to the jury on the legal theories of recovery, erred. The value of Rule 49(a) of the Federal Rules of Civil Procedure is to permit the court to charge the jury on only that which is necessary to make findings of fact. The application of law to fact is strictly for the court. The Second Circuit's decision would render ineffective Rule 49(a), by mandating that the jury instructions for a special verdict be identical to those for a general

verdict. The decision, as it stands, undermines the utility of the special verdict and should be reviewed in light of the purposes behind Fed. R. Civ. P. 49(a).

POINT III

THE FEDERAL COURTS ARE AUTHORIZED TO CHARGE PUNITIVE DAMAGES IN AN APPROPRIATE CASE

Although punitive damages are not specifically authorized by the Lanham Act, neither are they excluded by that Act. In such cases, it is within the power of the federal judiciary to determine whether an award of punitive damages is appropriate. Morrissey v. National Maritime Union of America, 544 F.2d 19, 24 (2d Cir. 1976); Basista v. Weir, 340 F.2d 74, 87 (3rd Cir. 1965). In this case, where respondents willfully violated petitioner's federally protected trade-

mark, resulting in a fraud upon the public, punitive damages were an appropriate remedy.

This Court recently considered the question of the availability of punitive damages in § 1983 actions notwithstanding the fact that no statutory provision authorizes that remedy. Smith v. Wade, 461 U.S. 30 (1983). Noting that the common law of torts allows the recovery of punitive damages where a defendant's conduct is outrageous because it results from an evil motive or reckless indifference to the rights of others, 461 U.S. 30, 46-47, the Court went on to note that it could "discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than

a person asserting an ordinary tort cause of action." 461 U.S. 30, 48-49.

In approving a punitive damage charge the Court, in Wade, focused upon reasons of policy equally present in this case:

> This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an

> interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.

461 U.S. 30, 54-54. The societal interest in punishing what constituted a fraud on the public in this case, should not be underestimated.

Similarly, in Carlson v. Green, 446 U.S. 14 (1980), the Court, noting that punitive damages may be awarded in a Bivens suit, stated, "[p]unitive damages are 'a particular remedial mechanism normally available in the federal courts' . . . and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." 446 U.S. 14, 22. While petitioner's constitutional rights were not violated in this case, important federal

rights were violated and the public itself damaged by the conduct of the respondents.

In this case, it is not contested that punitive damages would have been available to Getty under state law. There is no valid reason, then, for restricting that availability with respect to petitioner's federally guaranteed trademark rights. Here, as in Smith v. Wade, respondents' "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages". 461 U.S. 30, 51.

CONCLUSION

For all of the above reasons, this Court should issue a writ of

certiorari, as prayed for herein, to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

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